91-1734

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL J. BERRIDGE,

LINDA G. BERRIDGE,

Petitioners,

vs.

UNITED STATES

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAUL J. BERRIDGE
2583 Keystone Furnace Road
Jackson, Ohio 45640
(614) 286-2474

Pro Se

QUESTIONS PRESENTED

1. IS 28 U.S.C. 2680(C) A JURISDICTIONAL BAR TO THE DISTRICT COURT'S HEARING OF THE PETITIONERS CONSTITUTIONAL CLAIM?

2. ARE THE PETITIONERS DENIED A REMEDY BECAUSE OF SOVEREIGN IMMUNITY IF A FEDERAL AGENCY'S PROCEDURES HAVE ADVERSELY AFFECTED THE DUE PROCESS PROTECTION ACCORDED TO THE PETITIONER'S LIBERTY AND PROPERTY INTERESTS BY THE FIFTH AMENDMENT?

THE PARTIES

The parties set forth in the caption were the parties in the lower courts and are the only parties in this proceeding.

There are no parent companies or subsidiaries.

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CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V. U.S. CONSTITUTION

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

5 U.S.C. Section 552a(e)(5)

> (e) Each agency that maintains a system of records shall-
>
> (5) maintain all records which are used by the agency in making any determinations about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

5 U.S.C. Section 552a(g)(1)(c)

(g)(1) provides civil remedies... Whenever an agency

> (c) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual;

5 U.S.C. Section 552a(g)(4)(a)

> (4) In any suit brought under the provisions of subsection (g)(1)(C)

or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of-

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000;

26 U.S.C. Section 6212(a)

(a) In general.- If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

26 U.S.C. Section 6214

(a) Jurisdiction as to increase of deficiency, additional amounts, or additions to the tax. - Except as provided by section 7463, the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the

taxpayer, and to determine whether any additional amount, or any addition to the tax should be assessed, if claim therefor is asserted by the Secretary at or before the hearing or a rehearing.

28 U.S.C. Section 1331

The district courts shall have jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 2680(c)

The provision of this chapter and section 1346(b) of this title hall not apply to-

(c) Any claim arising in respect of the assessment of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

OPINIONS AND ORDERS BELOW

A copy of the Opinion of the District Court for the Sixth Circuit, Southern District of Ohio, dismissing the petitioners' complaint as an action barred by sovereign immunity, is attached as **Appendix A.**

Attached as **Appendix B** is a copy of the Order of the United States Court of Appeals for the Sixth Circuit upholding the District Court's decision that subject matter jurisdiction of petitioners' claim is barred by 28 U.S.C. Section 2680(c).

A copy of the order of the United States Claims Court, discerning petitioners pro se complaint as a due process claim beyond the limited jurisdiction of that Court, is attached as **Appendix C.**

JURISDICTION

The decision of the Court of Appeals for the Sixth Circuit was issued December 16, 1991.

A petition for rehearing was filed. The petition for rehearing was denied February 3, 1992, and this petition is filed within ninety (90) days after that date.

This court's jurisdiction is invoked under 28 U.S.C. Section 1254.

STATEMENT

In April of 1987, the petitioners lost their business, their business equipment and their personal assets along with Paul Berridge's livelihood. Petitioners were erroneously forced to suffer this loss. It came as a direct result of an Internal Revenue Service's "determination" to issue a notice of tax deficiency to them pursuant to 26 U.S.C. Section 6212(a). The Service acknowledged before issuing the notice of tax deficiency that a large deficiency determination would immediately deprive Paul Berridge of performance bonding. Further, the Service recognized that such a notice would destroy the Berridges' business and would cause them serious loss. Still, the Service would not grant a hearing for the factual basis of that proposed determination.

From 1984 the Berridges had made repeated requests to the IRS for a fair hearing of the facts upon which the Service proposed to act. The Service considered a notice of tax deficiency just a vehicle provided by the code to transport a citizen into Tax Court. Normally, within ninety days after receiving a notice of tax deficiency, any citizen may petition the Tax Court for a redetermination of the amount of tax allegedly owed (26 U.S.C. Section 6214). In Tax Court, the citizen has an opportunity to show that the IRS determination is incorrect. This process usually requires a year to a year and a half before a case may actually be heard in the Tax Court.

The IRS maintained that facts were irrelevant to a deficiency determination in the Berridges' case because of the availability of Tax Court. The Service

insisted that a notice of deficiency could be issued for any reason that suited the agency's purposes. Congressional inquiries and attempts to intervene in the Berridges' behalf were ignored.

A Department of Interior attempt to have the facts of Berridges' case reviewed also failed. A multi-billion dollar Interior mine reclamation program was being threatened by IRS's position in the proposed Berridge ruling. That Interior was pressured by the Service to propose legislation relating to the tax code is unimportant. What is important, however, is that Interior recognized major factual and legal errors contained in the proposed Berridge ruling. Interior asked the IRS for an opportunity to point out those errors before a determination was made. The Service steadfastly refused to grant a hearing.

The Berridges' factually alleged that

a serious injury would immediately result to their constitutionally protected liberty and property interests from the Service's proposed erroneous determination. The Service did not have procedures covering such an allegation. There was nothing in the agency regulations or in 26 U.S.C. Section 6212(a) compelling the Service to provide a hearing to an individual who may be injured by an erroneous determination. The Service, consequently, disregarded the Berridges' pleas for a fair hearing and issued the long threatened notice April 10, 1987.

The notice of tax deficiency represented a potential tax liability, several times the Berridges' net worth. The impact of that potential liability severely affected the Berridges' financial statement. Berridges' credit was eliminated and their loans were at once

shifted into technical default. Most importantly, such a negative financial statement instantly deprived Paul Berridge of performance bonding. The Berridges' could not operate their contracting business without bonding. Secured creditors immediately foreclosed.

First, the petitioners sought a temporary restraining order (TRO) in district court to lessen their injury. Petitioners sought a TRO as a way to protect their bulldozers and other heavy equipment from foreclosure until the potential tax liability could be removed in Tax Court. If they could have gotten a TRO there would have been a reason to petition the Tax Court for a tax hearing. Otherwise, the Tax Court offered no remedy at law for their immediate loss. The TRO was not granted. The district judge urged the Berridges to get an attorney and look to the bankruptcy laws for protection.

Unfortunately, deprived of performance bonding they were unable to contract work. In this situation the bankruptcy laws were of no avail. Bankruptcy could not protect the Berridges' equipment from imminent foreclosure. Paul Berridge immediately lost his occupation and all of his and his wife's equipment.

Next, the petitioners filed a pro se complaint against the United States in the United States Claims Court. Petitioners challenged the constitutionality of IRS's procedures and based their claim on the fifth amendment's guarantee of due process. Petitioners could find no congruence between the remedy offered in Tax Court of having the tax liability removed and the immediate irreparable loss they suffered. Petitioners also sought compensation for their loss as an additional remedy.

The Claims Court correctly

ascertained the nature of Berridges' cause of action as stating a due process claim (Appendix C). However, because of the specific limited jurisdiction afforded that Court by the Tucker Act, the Court had no option but to dismiss that portion of the complaint. The Court further analyzed Berridges' claim for additional relief and properly concluded that no statute existed that would confer a right to recover compensation for the petitioners' injury in that Court.

Petitioners then filed their due process claim in the District Court for the Southern District of Ohio. Again, they challenged the constitutionality of IRS's procedures asserting that 28 U.S.C. Section 1331 gave the Court jurisdiction to hear their cause of action. The question raised by the Berridge case was whether the standard procedure for adjudicating a tax claim in Tax Court is

constitutionally adequate when significant liberty and property interests other than tax money are immediately placed in jeopardy by an erroneous agency decision. Again, the petitioners sought compensation for their injury as a secondary form of relief.

Government counsel did not answer the complaint but moved instead for a dismissal of the complaint characterizing Berridges' cause of action as either a tax claim or a claim for damages resulting from a tort. Without a hearing on the motion for dismissal or any other form of pretrial procedure the District Court dismissed the petitioners' complaint as a "matter" bared by the doctrine of sovereign immunity (APPENDIX A). The Court of Appeals for the Sixth Circuit upheld the dismissal ruling that subject matter jurisdiction was barred by 28 U.S.C Section 2680(c) (APPENDIX B).

ARGUMENT

28 U.S.C. SECTION 2680(c) IS NOT A JURISDICTIONAL BAR TO THE DISTRICT COURT'S HEARING OF THE PETITIONERS' CONSTITUTIONAL CLAIM.

This case raises an important question concerning the right of a citizen to challenge constitutional deficiencies in a federal agency's application of a federal statute. The petitioners do not challenge the validity of a statute on its face. Rather, they challenge the constitutionality of the manner in which it has been administered in their case. Under the present statutory scheme, 26 U.S.C. Section 6212(a), a notice of tax deficiency may be issued without any opportunity for a fair hearing of its factual basis. It is assumed that Tax Court provides all the process necessary to decide any tax issue.

The petitioners do not raise a tax

issue. Their injury arose when the Service refused to hear evidence about the facts of their case. The irreparable harm they suffered occurred when the Service made a determination based upon those erroneous facts; knowing in advance that a large finding of tax deficiency would cause the Berridges to lose their livelihood and equipment. The question the petitioners ask the Court to decide is whether the Service's failure to provide any kind of a fair hearing, prior to making a "determination" or immediately thereafter, offends the due process clause of the Fifth Amendment.

There is a genuine issue of material fact raised by the petitioners complaint as to whether the petitioners suffered damage to their constitutionally protected liberty and property interests. Whether those interests are protected by the Fifth Amendment is an issue of law the District

Court may decide. The petitioners do not believe that 28 U.S.C. Section 2680(c) expresses a clear congressional intent to preclude that Court from hearing their due process claim. This Court reiterated its oft-repeated pronouncement about constitutional claims in Webster v. Doe 486 U.S. 592, 603, 108 S.Ct. 2047 2053-54, 100 L.Ed.2d. 632 (1988):

> "Where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."

The petitioners seek lawful conduct on the part of IRS. The absence of a mandatory hearing requirement does not mean that the petitioners are not entitled to minimal due process when their liberty and property interests are threatened. It is hard to see how a fair hearing of the facts that serve as the basis of a deficiency notice could impose an intolerable burden upon the Government.

The erroneous loss that the petitioners experienced because of the services refusal to grant a predeprivation hearing illustrates the point made by Justice Frankfurter in Joint Anti-Fascist Refugee Committee v. McGrath, 342 U.S. 123, 170-172, 71 S.Ct. 624, 647-649, 95 L.Ed. 817 (1951),

> "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights....[And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it."

Section 6212(a) of the Internal Revenue Code requires that the Commissioner "determine" that a tax deficiency exists before issuing a notice of deficiency. Nothing in the legislative history indicates that a "determination" is just a formal demand for an arbitrary amount that serves as an entry ticket to

Tax Court. Clearly Congress meant for the "determination" requirement of 6212(a) to have substantive content that would involve a finding based upon facts that the United States is entitled to an amount not yet paid. In Couzens v. Commissioner, 11 B.T.A. 1040, 1159-60 (1928) the Board emphasized that:

> "This must mean a thoughtful and considered determination that the United States is entitled to an amount not yet paid. If the notice of deficiency were other than the expression of a **bona fide** official determination, and were say, a mere formal demand for an arbitrary amount as to which there were substantial doubt, the Board might easily become merely an expensive tribunal to determine moot questions and a burden might be imposed on taxpayers of litigating issues and disproving allegations for which there had never been any substantial foundation."

Federal code, 5 U.S.C. Section 552a(e)(5), places an affirmative duty on federal agencies including the Service to maintain an accurate and complete "record" if that record is used to make a

determination which may prove injurious to an individual. Specifically section 552a(e)(5) states:

> (e) Each agency that maintains a system of records shall-
>
> > (5) maintain all records which are used by the agency in making any determinations about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

Respondents have contended that the District Court lacks jurisdiction to hear the petitioners constitutional claim because an exception to the Federal Tort Claims Act might prevent recovery under that statute. This Court spoke clearly to that question of jurisdiction in Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946):

> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause

of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction..."

The threshold questions that should be before the Court are as follows:

First- Do the petitioners have a constitutionally protected liberty and property interest in their occupation and equipment?

Second- Have the petitioners been deprived of protected interests by the Service's actions?

Third- Does the procedure of Tax Court or a suit for refund of over-

assessed taxes provide a full remedy for the deprivation of the petitioners livelihood and the foreclosure of their equipment?

THE PETITIONERS ARE NOT DENIED A REMEDY BECAUSE OF SOVEREIGN IMMUNITY IF A FEDERAL AGENCY'S PROCEDURES HAVE ADVERSELY AFFECTED THE DUE PROCESS PROTECTION ACCORDED TO THE PETITIONER'S LIBERTY AND PROPERTY INTERESTS BY THE FIFTH AMENDMENT.

This case also presents an additional question of whether the Court has the power to provide a full remedy to the petitioners for their constitutional injury. First, it must be underscored that relief is not a part of a cause of action and the Court's power to vindicate constitutional rights is well documented. Even if Congress is perceived not to have expressly provided a damages remedy for this case, this Court has specifically addressed the power of the federal courts to remedy violations of the Constitution

in Bush v. Lucas 103 S.Ct. 2404, 2409, 464 U.S. 367, 76 L.Ed.2d 648 (1983):

> "The federal courts power to grant relief not expressly authorized by Congress is firmly established. Under 28 U.S.C. Section 1331, the federal courts have jurisdiction to decide all cases "aris[ing] under the Constitution, laws, or treaties of the United States." This jurisdictional grant provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution, Bell v. Hood, 327 U.S. 678, 684, 66 S.Ct. 773,776, 90 L.Ed. 939 (1946), but also the authority to choose among available judicial remedies in order to vindicate constitutional rights."

Congress expects federal agencies to take reasonable steps to insure the informational quality of the record they rely upon in making determinations about individuals. This intent is clearly expressed in 5 U.S.C. Section 552a(g)(1)(c):

(g)(1) provides civil remedies... Whenever an agency

> (c) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual;
>
> the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

Additional relief is possible in this case if the Court rules that the Service's procedures do not accord the petitioners due process. Congress has expressly stated its intent that the United States shall be liable in 5 U.S.C. Section 552a(g)(4)(A):

> (4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the

> individual in an amount equal to the sum of-
>
> > (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000;

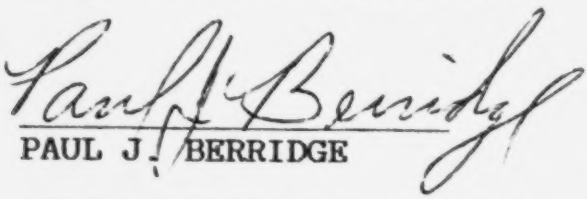
In summary, the petitioners recognize that a notice of deficiency represents only a potential tax liability and that under 26 U.S.C. 6214 a remedy exists to contest the alleged tax liability in Tax Court. Further, any citizen may challenge the merits of a tax determination through a suit for a refund after he pays the questioned tax and is denied a refund by the IRS. The petitioners acknowledge that these procedures are certainly adequate to protect both the citizen and the Government's property interest in any tax money in question. However, neither the remedy of Tax Court nor a refund suit bear any congruence to the liberty and property interests affected in the petitioners'

circumstances. Thus a genuine issue of material fact and law exists as to whether the petitioners were accorded due process, or alternatively, whether due process afforded through Tax Court was offered at a meaningful time and in a meaningful manner.

CONCLUSION

For the above reasons the Court should grant the writ of certiorari.

Respectfully submitted,



PAUL J. BERRIDGE

2583 Keystone Furnace Road
Jackson, Ohio 45640
(614) 286-2474

Pro Se

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C2-89-653

PAUL J. BERRIDGE, et al.,

Plaintiffs,

-V-

UNITED STATES OF AMERICA,

Defendant.

OPINION AND ORDER

This matter is before the Court pursuant of the Defendant, United States of America's, Motion for Dismissal under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The government has moved for the dismissal of this action for lack of jurisdiction and failure to state a claim upon which relief can be granted. Jurisdiction in this matter is alleged under Title 28 U.S.C. Section 1331.

FACTS

For purpose of the instant motions the relevant alleged facts are fairly simple. The plaintiffs essentially allege that the Internal Revenue Service ("IRS"), a part of the Department of the Treasury, which in turn is a department under the United States government, issued a notice of tax deficiency to the plaintiffs. The plaintiffs allege that the facts of this individual case do not support the IRS's assertion that the Berridges owed the massive tax deficiency to which they were placed on notice. The plaintiffs further allege that the issuance of this notice by the federal government effectively acted to deprive them of rights guaranteed to them by the Fifth Amendment of the United States Constitution.

ANALYSIS AND DECISION

The object of a motion to dismiss is

to test the sufficiency of the pleadings. All well pleaded facts are taken as true and the complaint is liberally construed in favor of the party opposing the motion. L'Orange v. Medical Protective Co., 394 F.2d 57, 59 (6th Cir. 1968). However, such a motion will not be granted "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Court will now look at the relevant law as it relates to this matter.

In the case of Ecclesiastical Order of the Isam of Am v Chassin, 845 F.2d 113, 115 (6th Cir. 1988), this circuit provides as follows:

> It is well settled that the United States as a sovereign is immune from suit unless it has expressly waived such immunity, United States v. Shaw, 309 U.S. 495, 500-01, 60 S.Ct. 659, 661-62, 84 L.Ed. 888 (1940). . . . Under the Federal Torts Claim Act, 28

> U.S.C. Sections 1346(b) and 2671 to 2679, the United States has waived its immunity with respect to certain actions. Actions connected with the assessment or collection of taxes, however-as this action is-are expressly excluded from the waiver. 28 U.S.C. Section 2680(c).

See also National Commodity and Barter Ass'n v. Gibbs, 886 F.2d 1240 (10th Cir. 1989) ("Federal Tort Claims Act's exception to waiver of sovereign immunity for claims arising with respect to assessment or collection of tax would not be considered inapplicable. . ."); Gibson v. Matthews, 715 F. Supp. 181 (E.D. Ky. 1989) (Plaintiff's claim barred by sovereign immunity); Childress v. Northrop Corp., 618 F. Supp. 44, aff'd 784 F.2d 1131 (D.C. Cir. 1985); Akers v. United States, 539 F. Supp. 831, aff'd 718 F.2d 1084 (2nd Cir. 1983).

In light of the extensive case law, coupled with the fact that this is a case against only the United States and not

against federal officials who are being sued in their individual capacities, this matter is clearly barred by the doctrine of sovereign immunity. As such, the Defendant, United States of America's motion for dismissal is hereby GRANTED.

IT IS SO ORDERED.

_____

GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX B

NOT FOR PUBLICATION

No. 91-3163

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL J. AND LINDA G. BERRIDGE,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendants-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF OHIO

BEFORE: Martin and Suhrheinrich, Circuit Judges; and Hillman, Senior District Judge.*

PER CURIAM. Paul and Linda Berridge appeal the dismissal of their action for damages against the United States. The

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* The Honorable Douglas W. Hillman, Senior District Judge for the Western District of Michigan, sitting by designation.

Berridges allege that the Internal Revenue Service ("IRS") deprived them of Fifth Amendment property rights by mailing a notice of tax deficiency.

We must decide whether sovereign immunity is a bar to the Berridges's constitutional claim. The Berridges's direct our attention to 28 U.S.C. Section 1331 as the source of jurisdiction. This argument is misplaced. Unlike state courts, federal courts enjoy only limited jurisdiction. The federal question statute authorizes jurisdiction over all civil actions for which the government has consented to be sued. A broader construction of section 1331 would eviscerate the doctrine of sovereign immunity.

The Federal Tort Claims Act ("FTCA") permits suits against the federal government when its employees commit negligent torts. 28 U.S.C. Section 2680.

But the FTCA'S waiver of sovereign immunity is limited by exceptions listed in 28 U.S.C. Section 2680. Section 2680(c) provides that "[a]ny claim arising in respect of the assessment or collection of any tax" is beyond the scope of the FTCA'S consent to suit.

Courts have interpreted this statutory exception broadly. See Capozzoli v. Tracey, 663 F.2d 654, 658 (5th Cir. 1981). The delivery to a taxpayer of a notice of tax deficiency is conduct "in respect of the assessment or collection of any tax." Assuming arguendo that the IRS committed a tortious act against the Berridges, subject matter jurisdiction is barred by 28 U.S.C. Section 2680(c)

Sovereign immunity is a jurisdictional hurdle the Berridges's have not overcome. FTCA Section 2680(c) makes it plain that the government does not

consent to be sued in cases involving the tortious issuance of a notice of tax deficiency. We therefore affirm.

Upon oral motion made by the government, we find this appeal to be so frivolous that sanctions are warranted. Fed. R. App. P. 38. The government is ordered to present its travel costs to the Clerk of this court. Such costs are hereby assessed against the Berridges.

APPENDIX C

IN THE UNITED STATES CLAIMS COURT

No. 370-89T

Filed: July 10, 1989

PAUL J. BERRIDGE AND
LINDA G. BERRIDGE

Plaintiff,

v.

THE UNITED STATES,

Defendant.

ORDER

This pro se case comes before the court on its own motion to dismiss for lack of jurisdiction.

FACTS *1

Plaintiff Paul Berridge is a contractor. In 1981, Mr. Berridge sought mine reclamation contracts from federal and state governmental agencies under programs established by the Surface Mining

Control and Reclamation Act of 1977. 30 U.S.C. Sections 1201 et. seq. Mine reclamation work requires expensive, specialized, heavy equipment. Mr. Berridge's capital-intensive contracting business was indebted to those creditors who lent money for the purpose of equipment.

Beginning with the tax year 1981, Mr. and Mrs. Berridge filed joint tax returns. Mr. Berridge used Schedule C of Form 1040 to report his business income. In 1984, the Internal Revenue Service (IRS) began an audit of Mr. Berridge's business.

As a result of the audit, the IRS issued to the Berridges on April 10, 1987, a notice of deficiency for tax years 1981, 1982 and 1984. The Berridges claim that because of the notice of deficiency, Mr.

---

*1 For purposes of this order only, the court assumes that all factual allegations in the complaint are true.

Berridge's surety revoked the performance bonding necessary for the contracting business to function. After the contracting business lost its bonding, creditors seized the business's assets.

The Berridges allege that, as a direct consequence of the notice of deficiency, they have been deprived of Mr. Berridge's occupation; they have lost business and personal assets; and they have suffered damage to their reputation and their credit rating. They claim that the IRS owed them "the right to be heard in order to contest the purported tax assessment in a hearing prior to the final determination or immediately thereafter in a post deprivation hearing." Thus, they allege that the IRS denied them due process of law which "resulted in an unconstitutional taking of plaintiffs' property without just compensation."

The Berridges claim that their loss

cannot be remedied by a tax court ruling in their favor or by a suit for tax refund. They seek $49.2 million for lost profit, lost equipment, lost bonding capacity, damage to their business and credit reputations, and exemplary damages.

DISCUSSION

The United States Claims Court is a court of limited jurisdiction. The United States may not be sued in the Claims Court except with the consent of Congress. United States v. Mitchell, 445 U.S. 535 (1980). Congress provided a waiver of sovereign immunity in the Tucker Act, 28 U.S.C. Section 1491, which states:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated damages not sounding in tort.

A waiver of sovereign immunity must be strictly construed. Kabua v. United States, 212 Ct. Cl. 160, 167, 546 f.2d 381, 385 (1976). The Tucker Act is a jurisdictional statute; it does not create substantive rights which are enforceable against the United States for money damages. United States v. Testan, 424 U.S. 392, 398 (1976). The Tucker Act grants jurisdiction only when an independent substantive right for money damages exists. Thus, the provision of the Constitution, statute or regulation on which a plaintiff relies must be fairly interpreted as mandating the payment of money. Eastport Steamship Corp. v. United States, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967).

The Berridges base their action on the fifth amendment to the Constitution. For all practical purposes, the portion of the fifth amendment which prohibits the

taking of private property for a public purpose is the only provision of the Constitution which mandates the payment of money within the meaning of the Tucker Act. While the Berridges allege that Mr. Berridge's occupation and "fundamental right to earn a livelihood by following the ordinary occupations of life" were "taken," it is absolutely clear that the gravamen of the complaint is that the IRS denied them due process. A claim seeking just compensation must rest upon a taking of property, not upon a violation of the right to due process. United States v. Connolly, 716 F.2d 882, 887 (Fed. Cir. 1983); cert. denied 465 U.S. 1065 (1984); Federal Insurance Company v. United States, 11 Cl. Ct. 569, 571-72 (1987). Moreover, it is well established that the due process clause of the fifth amendment provides no basis for relief in the Claims Court. Inupiat Community of the Artic

Slope v. United States, 230 Ct. Cl. 647, 662, 680 F.2d 122, 132 (1982) ; Mack v. United States, 225 Ct. Cl. 187, 192, 635 F.2d 828, 832 (1980), cert. denied, 451 U.S. 913 (1981). Thus, this court lacks jurisdiction over the Berridge's due process claim.

The Berridges concede that their claim is not for a tax refund. Even if the court were to view the complaint as seeking a tax refund, the court would be compelled to conclude that it lacks jurisdiction. The Berridges have failed to allege that they have filed a timely claim for refund with the IRS setting forth the grounds for the claim. 26 U.S.C. Section 7422(a) (1982). In addition, they do not claim that they have paid fully the assessed tax. Flora v. United States, 357 U.S. 63, 75 (1958), opinion on rehearing, 362 U.S. 145, 177 (1960).

Finally, all other matters alleged in the complaint are facially beyond the court's jurisdiction. The court does not have the power to award lost profits. See, e.g., Essex Electro Engineers, Inc. v. United States, 3 Ct. Cl. 277, 287 (1983). And, the court may not adjudicate claims sounding in tort, such as alleged damage to the Berridge's business and credit reputations, or claims for exemplary damages.

As the Berridges' action falls clearly outside the court's jurisdiction, the clerk is directed to dismiss the complaint. The dismissal will, of course, be without prejudice to the Berridges' right to file a complaint stating a cause of action within the court's jurisdiction. No costs.

WILKES C. ROBINSON, Judge

CERTIFICATE OF SERVICE

I, Paul J. Berridge, certify under penalty of perjury that I did serve three copies of the foregoing petition for writ of certiorari on counsel for the United States, by mailing said copies in the United States Postal Service, first class postage prepaid, and addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

D. Michael Crites
United States Attorney
85 Marconi Blvd.
Columbus, Ohio 43215

Gary R. Allen, Chief
Appellate Section Tax Division
Department of Justice
P.O. Box 502
Washington, D.C. 20044

Curtis C. Pett
Tax Division
Department of Justice
P.O. Box 502
Washington, D.C. 20044

Service Cont.

Attorney General of the United States
C/O Robert L. Handros, Trial Attorney
U.S. Department of Justice
P.O. Box 55
Ben Franklin Station
Washington, D.C. 20044

Executed on April 30, 1992.

PAUL J. BERRIDGE

2583 Keystone Furnace Road
Jackson, Ohio 45640
614-286-2474

Pro Se